

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002



Date Issued: April 7, 1999

Case No.: 1997-INA-0001

In the Matter of:

THE FOXHALL GROUP,
Employer,

On Behalf of

CEM HACIOGLU,
Alien.

Certifying Officer: Richard Panati, Region III

Appearance: Howard C. M. Hobbs

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

The application was filed on February 3, 1995, by The Foxhall Group (Employer) for the position of International Market Research Analyst², seeking labor certification for Cem Hacioglu, Alien. The duties of the job were described as follows:

Researches market conditions in international regional area to determine the potential for market penetration and increase of sales of company's services;
Establishes research design and implementation methodology for background data collection. Examines and analyzes statistical data to forecast future overseas market trends. Gathers data on competitors and analyzes prices, past and potential future sales, and methods of marketing and distribution for specific products.
Collects data for use in client profile reports and briefings.

Employer required that applicants have a Bachelor's degree in Mathematical Economics and one year of experience in the job offered or a Master's degree in International Finance. In addition, Employer required that applicants have one year of experience preparing country specific economic sector reports, one year of experience analyzing country specific data to forecast future trends and course work at the Bachelor's degree level in probability and statistics or econometrics, international economics and comparative economic systems.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on February 27, 1996 (AF 35-38). The CO stated that Employer's job requirements are unduly restrictive as the only way to qualify for the position; that there are other degrees and/or combinations of degrees that will provide applicants with the comparable skills and training necessary to perform the duties of this position; that a Bachelor's degree and three years of experience exceed the standard vocational preparation (SVP) of over 2 years up to and including

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

² *Dictionary of Occupational Titles* (DOT) 050.067-014 MARKET-RESEARCH ANALYST I (profess. & kin.). Researches market conditions in local, regional, or national area to determine potential sales of product or service: Establishes research methodology and designs format for data gathering, such as surveys, opinion polls, or questionnaires. Examines and analyzes statistical data to forecast future marketing trends. Gathers data on competitors and analyzes prices, sales, and methods of marketing and distribution. Collects data on customer preferences and buying habits. Prepares reports and graphic illustrations of findings.

4 years of combined education, experience and training for this position; and that the experience requirements are inflated since the requirement of performing the job duties for one year encompasses experience preparing country specific economic sector reports and the analysis of country specific data for forecasting future trends. The CO instructed Employer that it could rebut this finding by submitting evidence that the unduly restrictive requirements arise from a business necessity. The CO also asked Employer to provide documentation as to why other degrees would not provide applicants with the ability to perform the job duties and to explain why the experience requirements exceed the SVP (7) for the position. The CO also stated that qualified U.S. applicants had applied for the job and were rejected for other than lawful job-related reasons. The CO identified the rejected U.S. applicants as Carol Gabyzon, Sam-Qiang Jian, Diana Liu, John Yates and Thomas O'Neil.

Employer, by counsel, submitted rebuttal dated July 15, 1996 (AF 10-34). Counsel requested that The Foxhall Group be recognized as the successor Employer to the original petitioning Employer, Applied Solutions International. Counsel also included a letter from the Staffing Center Manager of the World Bank (AF 12-18). The manager stated that he is responsible for hiring an average of 250 candidates a year, including 40 to 50 economists and international market analysts. He stated further that international market research analysts are responsible for researching market conditions in various regions around the world to determine penetration potential for companies or specific goods and services. He stated further that a Bachelor of Science degree in mathematical economics with a strong concentration on statistics, international economics and comparative economic systems represents the standard minimum requirements for any international market research analyst. He opined that "[o]ther degrees of broader and more general scope such as management, marketing, business, international relations, general economics, or of an irrelevant technical field with little or no practical applicability such as engineering, would not provide the analyst with the firm theoretical grasp s/he need to break down and analyze the complicated statistical parameters" (AF 12).

In a letter dated July 15, 1996, the President of The Foxhall Group stated, in part, that his clients require the design and development of sector-specific predictive econometric models for selected countries; that only an analyst with specific technical skills gained from a Bachelor's degree in a mathematical economics curriculum has these skills. He stated further that an individual without this degree would not know the proper information to gather, would not understand how to analyze the data, and would form incorrect conclusions. He stated further that the CO had misinterpreted the experience requirement; that Employer has treated the experience requirement as a concurrent requirement that an applicant could satisfy with one year of experience as a market research analyst. He stated that he telephonically interviewed each applicant who had more than one year of experience as a market research analyst. (AF 14-16)

Employer also submitted a brief in support of its rebuttal to the NOF (AF 17-34). In the brief, Counsel argued that (1) Employer's educational requirements are normal in the context of the Occupational Outlook Handbook as well as by industry standards and practice; (2) Employer's description of its education and experience requirements do not exceed the DOT SVP of two to four years; (3) the experience requirements of one year analyzing country specific data in forecasting future trends and one year preparing country specific economic sector reports were not intended to be read as cumulative experience requirements; (4) Employer's education and

experience requirements arise out of a business necessity specific to this Employer and the position offered; (5) and that Employer rejected U.S. applicants for lawful job-related reasons.

The CO issued a Final Determination denying certification on August 9, 1996 (AF 5-9). The CO found that Employer's job requirements are unduly restrictive, citing § 656.21 (b)(2); that other degrees and/or combination of degrees would provide applicants with the comparable skills and training necessary to perform the job duties; and that Employer's job requirements listed in item 15 of the labor certification application exceed the SVP of two to four years of combined education, experience and training for the job. The CO was not persuaded by the rebuttal letter from the World Bank manager, because the World Bank was the Employer with whom the Alien had gained his qualifying experience and the manager provided no information as to whether or not the World Bank ever hires individuals for this or similar positions without a B.S. degree in mathematical economics.³ The CO stated that the Alien had been hired by the World Bank to perform nearly identical duties to the offered position without having had any prior experience. Therefore, the CO reasoned that contrary to the manager's statements, it would appear that the World Bank requires no experience and a B.S. degree in mathematical economics to perform very similar job duties.

Regarding the experience requirements, the CO stated that Employer's application and advertisement strongly suggest that three years of experience are required to qualify for this job, not one year of total experience performing the duties of the job, preparing country specific economic sector reports and analyzing country specific data to forecast future trends. The CO stated that Employer rejected U.S. applicant Carol Gabyzor because she did not have one year of experience preparing country specific economic sector reports or one year of experience analyzing country specific data to forecast future trends, while according to Employer's rebuttal, an applicant would not need one year of experience in either of these activities, but simply have performed these duties as part of a larger job. The CO concluded that Employer did not demonstrate that its requirements are not unduly restrictive and do not exceed the SVP for this position. In addition the CO stated that Employer's rejection of U.S. applicant Carol Gabyzon in favor of the Alien cannot be regarded as arising from lawful job-related reasons.

Employer, by counsel, requested administrative-judicial review on September 17, 1996 (AF 1-4). Counsel argued, among other things, that the CO failed to address the issue of whether Employer's rebuttal to the NOF established business necessity and that therefore the CO's denial should be reversed.

DISCUSSION

Whether or not Employer documented a business necessity for the contested job requirements is not determinative in this case. Therefore, the CO's failure to address this issue in the Final Determination was a harmless error.⁴ U.S. applicant Carol Gabyzon's cover letter and

³ The Alien's major field of study in college was mathematical economics.

⁴ We note that as the SVP for this position is two to four years of combined education and experience, any experience beyond a four year bachelor's degree exceeds the requirement. This is consistent with the fact that the

resume clearly indicate that she meets the minimum requirements for this position. (AF 60-61) She has a Bachelor's degree with a major in economics and a Master's degree in international trade and finance. She has more than a year's experience in international trade matters, including gathering and analyzing legal, financial, economic and statistical data. She also has published papers on border tax adjustments, domestic subsidies in international trade and the Italian and German market potential for Faberware wokware. In addition, she is fluent in French, Italian and English and has language skills in Spanish and German. Employer conceded in its rebuttal that Mrs. Gabyzon had more than one year of experience as a market research analyst. (AF 15)

Employer rejected this applicant solely on the basis that she did not have one year of experience preparing country specific economic sector reports or one year of experience analyzing country specific data to forecast future trends (AF 48). Yet, when these experience requirements were challenged by the CO as exceeding the SVP, Employer responded that it did not mean that an applicant must have a separate year of experience performing each of these activities, plus a year of experience performing the job duties. Rather, Employer stated that only one year of experience as a market analyst involved with these activities is required. (AF 15) Mrs. Gabyzon meets and exceeds this experience requirement. Therefore, her rejection by Employer was not based on lawful job-related reasons. The regulations provide, and this Board has consistently held that U.S. workers applying for a job offered to an Alien may be rejected only for lawful job-related reasons. (20 C.F.R. § 656.21(b)(6)) *Seaboard Farms of Athens, Inc.*, 90-INA-333 (Oct. 29, 1991). A U.S. applicant who meets the minimum requirements for the job is qualified and should be hired in place of the Alien. *United Parcel Service*, 90-INA-90 (March 28, 1991).

Employer's rejection of Mrs. Gabyzon was not a lawful job-related rejection and certification of the Alien was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

alien was hired by The World Bank in the same position with no prior experience.

***Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

